Office - Supreme Court, U.S.
FILED
OCT 3 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 421

KOKOMO PAPER HANDLERS' UNION No. 34 and KOKOMO PRINTING PRESSMEN & ASSISTANTS' UNION No. 302, INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO,

Petitioners,

v.

CUNEO PRESS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN K. RUCKELSHAUS, and
JOHN C. O'CONNOR
1506 Morris Plan Building
108 E. Washington Street
Indianapolis 4, Indiana

Attorneys for Respondent.

C. E. Pauley & Co., Inc., Indianapolis

TABLE OF CONTENTS

Page

Statement 2

Argument 4

Conclusion 6

Statutes:

United States Arbitration Act, 9 U. S. C. A., Sec. 3 6

Cases:

Signal-Stat Corp. v. Local 475, United Electrical, Radio and Machine Workers of America (U.E.), decided July 2, 1956, — Fed. 2d — 4

Miller v. Commissioner of Internal Revenue, 183 Fed. 2d 246 5

Walker Grain Co. v. Southwestern Telegraph & Telephone Co., 10 Fed. 2d 272 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 421

KOKOMO PAPER HANDLERS' UNION NO. 34 and KOKOMO PRINTING PRESSMEN & ASSISTANTS' UNION NO. 302, INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO,

Petitioners,

v.

CUNEO PRESS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The respondent, Cuneo Press, Inc., submits the following brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit filed by the petitioners Kokomo Paper Handlers' Union No. 34 and Kokomo Printing Pressmen & Assistants' Union No. 302.

STATEMENT

The petitioners set forth in their petition for certiorari a partial statement of facts presented by this case. In addition it will be noted that the respondent's verified complaint, filed initially in this law suit, contained the following allegation:

> "That the plaintiff has contracts to print the following nationally known magazines and publications at certain definite times in the immediate future: 'Good Housekeeping,' 'American Home,' 'Sports Afield,' 'Every Woman,' 'Mamoth' and other publications which are widely distributed in various parts of the United States and foreign countries; that unless the defendants herein are restrained from preventing the publication of said magazines and periodicals the plaintiff will be unable to fulfill its contracts with the publishing concerns referred to above thereby resulting in large monetary and other damages of an irreparable nature and character. That said defendants have caused said work stoppage of the entire operation of plaintiff's Kokomo, Indiana, plant because of their dispute with another union over certain work in plaintiff's plant which amounts to not more than 1/10th of 1% of the entire operations in said plant. That said work stoppage, caused by the defendants was and is without just cause." (R., 5.)

The petitioner's motion to stay (the denial of which was the sole question present to the Court of Appeals) contained the following allegation:

> "and these defendants being not in default in proceeding with such arbitration." (R., 7.)

The record likewise discloses that the respondent, on the occasion of the hearing on the motion to stay in the United States District Court at Indianapolis, filed with such Court the affidavit of Frank H. Ingram, Vice-President of the respondent Cuneo Press, Inc., which affidavit contained the following statement:

> "(3) That on January 24, 1955, the defendant Unions as charged in plaintiff's complaint, did engage in what is commonly termed a 'sit-down strike'; that such strike was called and conducted by said Unions in direct violation of the contract which was in full force and effect by and between such Unions and the plaintiff herein; that the Unions at no time made any attempt whatsoever to submit any agreement or complaint to arbitration, but on the contrary, proceeded to call such strike without warning or notice to the plaintiff; that if there were any grievances, which were submitted to arbitration in accordance with such contract of employment, the defendants were wholly in default in calling such strike without attempting to arbitrate any alleged complaint or grievance. That the contract referred to in plaintiff's complaint between plaintiff and defendants, contained no provisions whatsoever providing for arbitration of a claim for damages arising out of an unauthorized and illegal strike." (R., 10-11.)

The petitioners at no time have denied the facts set forth in the above pleading and affidavit except the conclusion contained in the affidavit of Mr. Ingram as to the scope of the collective bargaining contract in question. Such undisputed facts were before the trial judge prior to his entering an order denying the petitioners' motion to stay.

The petition for writ of certiorari furthermore explains this decision of the Court of Appeals on the theory that when the Petitioners "by-passed the grievance procedure for the purpose of engaging in a strike they thereby waived their right to arbitrate the resulting issues of contract breach and damages raised by the suit." (Petition 5-6.)

An examination of this opinion of the Court of Appeals in our case discloses that the ruling of the District Court denying the motion to stay was upheld because the petitioners herein "were in default in proceeding with such arbitration," which according to the express terms of the statute in question deprived such petitioners of the right to have the motion to stay granted.

ARGUMENT

The petitioners urge that the writ of certiorari should be granted because "There is a square conflict between the decision of the Seventh Circuit in this case and the decision of the Court of Appeals for the Second Circuit in *Signal-Stat Corp. v. Local 475, United Electrical, Radio & Machine Workers of America (U. E.)*, decided July 2, 1956." (Petition 6.)

An examination of the two decisions referred to above fails to disclose the conflict asserted by the petitioners. In our case decided by the Court of Appeals for the Seventh Circuit, there was no holding that the Federal Arbitration Act applied to our case. The Court stated "We shall assume without deciding, that said Act is applicable to this case." This decision rests squarely and entirely on the proposition that

even *if* the Federal Arbitration Act was applicable there was evidence to support the conclusion that the petitioners had not complied with a mandatory requirement of such arbitration statute in that such petitioners were in default in proceeding with such arbitration. The Court of Appeals would be required under our federal appellate practice to affirm the decision of the trial judge on this point unless it could be stated that there was no substantial evidence before the trial judge to justify the trial court's conclusion.

Miller v. Commissioner of Internal Revenue, 183 Fed. 2d 246.

Moreover where all the evidence is not included in the record on appeal (as was true in this case—R., 19), it will be assumed that there was substantial evidence before the trial court to support a finding of fact.

Walker Grain Co. v. Southwestern Telegraph & Telephone Co., 10 Fed. 2d 272.

Unquestionably there was evidence, entirely uncontradicted by the petitioners, supporting the fact that the petitioners were in default in proceeding with arbitration. There arose shortly prior to the strike called by the petitioners a controversy with another union whose members likewise were employees of the respondent. Irrespective of the nature of such controversy according to the collective bargaining contract (Petition 13-17) it should have been settled in accordance with the grievance procedure or later submitted to arbitration if necessary. The petitioners admittedly ignored and violated this obligation to proceed in accordance with their contract. When they by-passed the grievance and arbitration procedure how could the trial judge escape the conclusion that

these petitioners were "*in default in proceeding with such arbitration?*"

9 U. S. C. A. Sec. 3, United States Arbitration Act.

Next an examination of the decision of the Second Circuit Court set forth in the petition as Appendix "C" (Petition 25-33) *Signal-Stat Corp v. Local 475 et al.* shows that the single question decided by the Seventh Circuit referred to above was not even considered in the decision of the Second Circuit. There is no reference whatsoever to the proposition that the Federal Arbitration Act had been violated in that the party moving for a stay was charged with being in default in proceeding with such arbitration, in the Second Circuit decision.

In addition an examination of each of the other decisions cited by petitioners would illustrate that in no one of such decisions was the question as to a party being in default in proceeding with arbitration considered, discussed or decided.

While the facts involved in these two cases may be similar the legal questions determined by the court in each case are not the same.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

JOHN K. RUCKELSHAUS, and
JOHN C. O'CONNOR
1506 Morris Plan Building
108 E. Washington Street
Indianapolis 4, Indiana

Attorneys for Respondent.